

FCC MAIL SECTION

FEDERAL COMMUNICATIONS COMMISSION

FCC 99-322

OCT 9 10 35 AM '99

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

DISPATCHED BY

In the matter of

Amendment of 47 C.F.R. § 1.1200

et seq. Concerning Ex Parte

Presentations in Commission

Proceedings

)  
)  
)  
)  
)  
)

GC Docket No. 95-21

**MEMORANDUM OPINION AND ORDER**

Adopted: October 28, 1999

;

Released: November 9, 1999

By the Commission:

**I. INTRODUCTION**

1. This memorandum opinion and order denies two petitions for reconsideration of Report and Order, Amendment of 47 C.F.R. § 1.1200, 12 FCC Rcd 7348 (1997), in which we modified our rules concerning ex parte presentations in Commission proceedings. We conclude that the petitions, filed May 2, 1997, by Hogan & Hartson, L.L.P. (Hogan & Hartson), and May 5, 1997, by Lukas, McGowan, Nace & Gutierrez (LMNG), do not warrant departing from the public interest evaluation we made in adopting the new rules.<sup>1</sup> We do take this opportunity, however, to make some minor revisions in the Report and Order in light of our experience applying the new rules.

**II. BACKGROUND**

2. In this proceeding, the Commission revised its rules governing ex parte presentations in Commission proceedings to make them simpler and clearer, and thus more

---

<sup>1</sup> We also received reply pleadings, on May 30, 1997, from AT&T Corporation (AT&T), and on June 4, 1997, from SBC Communications, Inc. (SBC), MCI Telecommunications Corporation (MCI), Nextel Communications, Inc. (Nextel), and the Federal Communications Bar Association (FCBA).

effective in ensuring fairness in Commission proceedings. The most significant aspect of this revision was to simplify the system for specifying whether proceedings are "restricted," "permit-but-disclose" or "exempt," and determining (subject to specific exceptions) how ex parte presentations to or by Commission decisionmakers are treated in the proceedings. An ex parte presentation is a communication concerning the outcome or merits of a proceeding which -- if written -- is not served on all parties and -- if oral -- is made without notice and the opportunity for all parties to be present. In restricted proceedings, ex parte presentations to or by Commission decisionmakers are prohibited. In permit-but-disclose proceedings, ex parte presentations to Commission decisionmakers are permitted but must be disclosed on the record of the proceeding. In exempt proceedings, ex parte presentations may be made without limitation.

3. Under the revised system, all proceedings not specifically designated as exempt or permit-but-disclose (either by the rules or by order or public notice in an individual proceeding) are restricted from the point that someone becomes a "party" to the proceeding as defined by the rules. The Commission specified relatively short lists of proceedings classified as exempt or as permit-but-disclose (a term replacing the former term "nonrestricted").

4. The Commission also revised the ex parte rules in certain other respects. It adopted a new exception to the Sunshine period prohibition (pursuant to which presentations, whether ex parte or not, are generally not permitted once an item has been placed on a Sunshine notice.) The new exception permits the discussion of recent Commission actions at widely-attended meetings or symposia in the presence of Commission decisionmaking personnel. Additionally, the Commission expanded the authority of the Office of General Counsel to evaluate alleged ex parte violations. It also increased to at least twice a week the frequency with which the Commission's Secretary publishes lists of ex parte presentations. Finally, the Commission clarified several aspects of the rules and codified some existing interpretations and policies.

### III. HOGAN & HARTSON PETITION

5. Pleadings. Hogan & Hartson questions the Commission's determination to make all proceedings restricted unless the proceeding has been specifically listed in the rules as exempt or permit-but-disclose. See 47 C.F.R. § 1.1208; 12 FCC Rcd at 7352 ¶ 12. Hogan & Hartson contends that, instead, the Commission should treat as permit-but-disclose all proceedings except a narrow group of quasi-judicial proceedings, as the Commission had originally proposed in the notice of proposed rulemaking in this proceeding. See Amendment of 47 C.F.R. § 1.1200, 10 FCC Rcd 3240, 3242 ¶ 16, 3244 ¶ 30 (1990). According to Hogan & Hartson, the Commission's approach tends to inhibit important informal contacts between the Commission and outsiders. By contrast, Hogan & Hartson asserts that using a permit-but-disclose approach for more proceedings would encourage the submission of information to the Commission. Hogan & Hartson expresses concern that in some situations

Commission staff might be engaged in informal negotiations to resolve a dispute among factions in a controversy, when one of the participants involved files a pleading, thereby cutting off further contacts and frustrating the process. Hogan & Hartson argues that the staff should not have the burden of relaxing restrictions in specific cases.

6. AT&T Corporation (AT&T), MCI Telecommunications Corporation (MCI), and SBC Communications, Inc. (SBC) support Hogan & Hartson's position. These commenters agree with Hogan & Hartson that treating more proceedings as permit-but-disclose would better promote the free flow of information and that the burden should be on showing why a proceeding should be restricted and not the other way around. AT&T observes that a party might not have notice of a filing that makes a proceeding restricted. SBC complains that the Commission did not adequately explain why it did not adopt the proposal set forth in the notice of proposed rulemaking to use permit-but-disclose as the default category.

7. The FCBA opposes Hogan & Hartson's position. In the FCBA's view, the Commission's rules will not unduly impede the free flow of information to the Commission. The FCBA asserts that the Commission specifically classified as permit-but-disclose those types of proceedings in which greater than usual access is desirable and created exceptions in other situations warranting a free flow of information.

8. Discussion. We will not reconsider our decision to use restricted, rather than permit-but-disclose as the default category. In our NPRM, we proposed to significantly broaden the class of proceedings treated as permit-but-disclose and to treat only a relatively narrow class of proceedings as restricted. 10 FCC Rcd at 3242-45 ¶¶ 14-37. Ultimately, however, we were persuaded by the comments of those who argued that such a broad expansion of the permit-but-disclose category might be procedurally disruptive and create the appearance of unfairness. 12 FCC Rcd at 7351-52 ¶¶ 9-13. Thus, to the extent that a party's filing would serve to cut off informal discussions with the staff, this result is generally warranted. Moreover, we are not persuaded that persons wishing to make presentations to the Commission have significant difficulties learning of relevant filings.

9. We also reject any suggestion that we did not fully consider the public interest benefits of using permit-but-disclose procedures. Commenters pointed out various types of proceedings in which the balancing of public interest considerations favored the use of permit-but-disclose procedures. In those instances, we approved their use. 12 FCC Rcd at 7358-59 ¶¶ 32-35. Hogan & Hartson does not call our attention to any specific type of proceeding in which our use of the restricted category would have an untoward effect. Moreover, a particular proceeding may be made permit-but-disclose on an ad hoc basis where specific circumstances warrant such action. We therefore decline to reconsider our prior action.

#### IV. LUKAS, MCGOWAN, NACE & GUTIERREZ PETITION

10. Pleadings. Lukas, McGowan, Nace & Gutierrez (LMNG) takes issue with the Commission's treatment under the revised ex parte rules of complaints against common carriers pursuant to 47 U.S.C. § 208. The Commission's rules specify procedures for both informal section 208 complaints (47 C.F.R. § 1.716 et seq.) and formal section 208 complaints (47 C.F.R. § 1.720 et seq.). In revising the ex parte rules, the Commission ruled that it would continue to treat informal section 208 complaints as exempt and formal section 208 complaints as restricted. See 47 C.F.R. §§ 1.1202(d)(2), 1.1204(b)(5), 1.208; 12 FCC Rcd at 7354-55 ¶¶ 20-22.

11. LMNG contends that informal complaint proceedings should be treated as restricted. LMNG notes that, although informal complaints are intended to provide a simple and fast means of resolving disputes, there are no restrictions on the issues that can be raised by informal complaint. Thus, according to LMNG, a carrier's competitors have an opportunity to use the informal procedure to raise serious allegations or file abusive complaints without the carrier having a fair opportunity to respond. Alternatively, to prevent this from occurring, LMNG recommends that the informal complaint procedure be open only to a carrier's customers to complain about the carrier's violation of its obligations to the customers.

12. Nextel agrees with LMNG that the current rules provide an opportunity for a carrier's competitors to file abusive complaints creating regulatory obstacles for the carrier. Like LMNG, Nextel argues that in a competitive environment, carriers should have an opportunity to respond to all complaints about them, which would tend to deter the filing of abusive complaints. Nextel supports LMNG's alternative of limiting the use of informal complaints to a carrier's customers.

13. MCI and AT&T oppose LMNG's argument. They argue that disputes between carriers benefit from the flexibility and opportunity for mediation offered by the informal complaint process. They further argue that LMNG has shown no evidence that use of the informal complaint process by competitors has resulted in undue prejudice. In any event, AT&T urges that questions regarding the availability of informal complaints to non-consumers is beyond the scope of this proceeding, which deals only with the ex parte rules.

14. Discussion. We continue to believe that there are sound reasons to provide for different ex parte treatment where our rules explicitly distinguish between a formal and informal complaint process. In our Report and Order, we noted that the informal section 208 process was intended to be preliminary in character and to rely on informal mediation to expeditiously resolve disputes. 12 FCC Rcd at 7355 §§ 21-22. These factors justify treating informal complaints as exempt even though formal complaints are appropriately treated as restricted. Moreover, these considerations apply equally, regardless of who the complainant is.

15. To the extent that LMNG argues that informal complaints by competitors should be precluded, we agree with AT&T that this is a question beyond the scope of the present proceeding. In its petition for reconsideration, LMNG has not made a substantial showing that complaints by competitors abuse -- or tend to abuse -- our processes. If LMNG wishes to do so, it may pursue this matter in a different, more appropriate context. Accordingly, we will not further consider this question here.

## V. ADDITIONAL MATTERS

16. Although our experience with the revised rules has generally been positive, it nevertheless has called our attention to areas that require further consideration. We therefore take the opportunity to modify the revised rules in certain minor respects.

17. Parties. As noted above, a key aspect of the revised rules is that they explicitly define who is a "party" for purposes of the ex parte rules. 47 C.F.R. § 1.1202(d). The rule generally defines as a party:

(1) Any person who files an application, waiver request, petition, motion, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person (other than an individual viewer or listener filing comments regarding a pending broadcast application) filing a written submission referencing and regarding such pending filing which is served on the filer, or, in the case of an application, any person filing a mutually exclusive application . . . .

18. Upon reflection, we conclude that this definition generally establishing rights under the ex parte rules should not apply to proceedings designated for hearing. In a hearing proceeding the identity of the parties is formally specified by the hearing designation order and by orders permitting intervention. Application of the general definition to hearing proceedings could result in situations where persons making informal filings would be deemed parties for ex parte purposes (thereby entitling them to service and other procedural rights) even though they would not be considered parties for any other purpose. We find that such an inconsistency would be unduly confusing and potentially disruptive in hearing proceedings. We will therefore amend the rules to provide that in hearing proceedings the only parties for ex parte purposes are those who have been formally given party status. Nonparties would be required, as they are now, to serve or give notice to all existing parties to a proceeding. Otherwise their presentations would be deemed to be prohibited ex parte presentations.

19. A second area of concern relates to the exception to the general definition for "an individual viewer or listener filing comments regarding a pending broadcast application." See

also 47 C.F.R. § 1.202(d) Note 4, 1.1204(a)(8). We incorporated this exception to take into account the provisions of our rules that require broadcast applicants to give public notice of their applications so that members of the public may comment. 47 C.F.R. § 73.3580. We anticipated that members of the public availing themselves of this opportunity might well do so in an informal manner. FCC 97-92 at ¶ 19. They might not feel any need to serve their comments on the applicant or expect to be served with other filings responsive to the application. We gave the Mass Media Bureau discretion, in appropriate circumstances, to make individual viewers and listeners parties for ex parte purposes.

20. We wish to make clear that the individual viewer/listener exception applies only when such individuals informally file comments regarding pending broadcast applications. Consistent with the Communications Act and our rules, individual viewers and listeners who file formal petitions to deny are deemed parties without any need for action by the Bureau. See 47 U.S.C. §§ 309(d),(e); 47 C.F.R. §§ 1.221(d), 73.3584. To the extent that paragraph 19 of our Report and Order might suggest otherwise, we hereby modify it.

21. Additionally, we wish to make clear that, although the individual viewer/listener exception was prompted by the public notice provisions of our rules, individual viewers and listeners who comment on applications not subject to the public notice provisions are nevertheless covered by the exception. We find an equal expectation of informality in these circumstances. Similarly, we do not intend to construe status as a "viewer or listener" in an unduly restrictive way, and thus, for example, individuals commenting on unbuilt stations (which, narrowly speaking, do not have "viewers" or "listeners") would be included in the general viewer/listener class. In sum, we mean the exception to apply to individual members of the viewing and listening public in a facility's service area regardless of whether they are regular viewers or listeners of a specific station.

22. Our consideration of the individual viewer/listener exception has suggested another group that should be given special treatment. Members of Congress or other governmental officials may well have occasion to submit their own views or forward those of a constituent on a pending proceeding. These communications would be subject to applicable ex parte restrictions, such as the need for service on the parties. However, we doubt that Members of Congress, for example, would expect to become parties themselves and thus be served with or notified of all presentations in a proceeding merely because they served a submission on the parties. We will therefore revise the rules to provide that Members of Congress and other governmental officials who serve their filings do not automatically become parties. They may, however, be made parties for purposes of the ex parte rules if that is warranted based on their affirmative request for such status.

23. Our experience with 47 C.F.R. § 1.1202(d)(3) indicates that an amendment of the rules is necessary. This provision defines as a party "any person who files a petition to revoke a license or other authorization or who files a petition for an order to show cause and

the licensee or other entity that is the subject of the petition." We have encountered situations in which a person has filed, without making service, a relatively informal pleading that asks in passing for an authorization to be revoked. This situation creates an ambiguity as to whether the pleading should be treated as a petition to revoke or an informal complaint. Upon reflection, we find no good reason to differentiate between the treatment of requests to revoke a license or for an order to show cause, on the one hand, and, complaints, on the other hand. We see no reason to make the precise relief requested dispositive. We will therefore amend the rules to provide for the uniform treatment of complaints and requests for revocation or for an order to show cause.

24. Classification of Proceedings. In revising the rules, we endeavored to create a relatively simple system for determining the proper classification -- as restricted, exempt, or permit-but-disclose -- of any type of proceeding. Our experience has revealed, however, two instances of inappropriately classified proceedings. Moreover, we have determined that the rules should be updated to take into account some recently adopted complaint procedures. We will revise the rules accordingly.

25. The first instance involves modification requests under 47 C.F.R. § 64.1001. Such requests to authorize alternative payment arrangements between U.S. carriers and foreign correspondents that deviate from our International Settlements Policy are not specifically categorized in the ex parte rules. Thus, under the catch-all provision, 47 C.F.R. § 1.1208, they would be classified as restricted. This is not our intention. In adopting the present version of § 64.1001, we specifically changed the designation of these requests from "waiver" requests to "modification" requests precisely because we did not want them to be restricted, as waiver requests generally are. We stated (Regulation of International Accounting Rates, FCC 96-459 (Dec. 3, 1996) at ¶ 62):

... we also amend Sections 43.51 and 64.1001 of our rules to refer to "waiver requests" submitted under section 64.1001 as "modification requests." We make this change in order to conform our rules to the International Bureau's historic practice of treating waiver requests filed under Section 64.1001 as non-restricted [i.e., permit-but-disclose] proceedings, in the same manner as Section 214(a) proceedings are treated under the Commission's ex parte rules. [Footnote omitted.]

We will make a conforming change to the ex parte rules to classify these modification requests as permit-but-disclose.

26. The second instance involves Bell Operating Company applications to provide in-region, interLATA services pursuant to 47 U.S.C. § 271(d). Such applications are not specifically listed in the ex parte rules and thus, as with respect to section 64.1001 requests,

would be restricted by default. However, we indicated in a public notice (FCC 96-469, Dec. 6, 1996)) that we intended such proceedings initially to be considered permit-but-disclose. We will conform the ex parte rules to provide that section 271(d) applications will be permit-but-disclose. Similarly, we indicated in a public notice (FCC 98-295, Nov. 17, 1998) that petitions for preemption pursuant to 47 U.S.C. § 253 would be treated as permit-but-disclose, and we will codify that ruling as well. As an additional related matter, we are aware that the Common Carrier Bureau routinely exercises its discretion to treat as permit-but-disclose another unlisted type of proceeding, petitions for Commission preemption of authority to review interconnection agreements under 47 U.S.C. § 252(e)(5). We wish to ratify the Bureau's practice and provide that section 252(e)(5) proceedings will be treated as permit-but-disclose. We will revise the rules accordingly.

27. As a further additional matter, we have also become aware of situations concerning preemption petitions in which the current ex parte procedures that apply do not fully protect the interests of all parties involved and/or named in these petitions. While these situations do not warrant a reclassification of the relevant proceedings, we believe that the applicable procedures should be supplemented to a certain extent.

28. Specifically, there have been a number of instances in which petitioners seeking federal preemption of state or local authority through petitions for rulemaking or petitions for declaratory ruling have identified the actions of particular states or localities as illustrative of actions warranting such preemption. In some cases, the jurisdictions named in the petition were not aware of the petition or the allegations made about them in the petition. Under current ex parte rules, the state or local government that is the subject of the petition, as well as those cited as illustrative of the offending behavior, would not necessarily receive any notice of the petition. In the case of a petition for declaratory ruling, the proceeding initiated would be permit-but-disclose, but because the state or local government would not be a party, no disclosure would be required. A petition for rulemaking is an exempt proceeding, again requiring no service or disclosure.

29. We remedied this situation, in part, in the context of section 253 petitions, when we provided guidelines for filing such petitions. See Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act FCC 98-295 (Nov. 17, 1998), 1998 WL 795321. We directed petitioners to serve a copy of Section 253 petitions on each state or local government entity to which the petition applies and reference such service in the petition. We believe that the ex parte rules should be amended to make this requirement applicable to all preemption petitions and not only for Section 253 petitions. Moreover, we believe that service should be made not only on those state and localities that are the subject of the petition but also on those whose actions are identified as warranting preemption. We believe that this will enhance our ability to resolve such petitions in the public interest by giving the relevant state or local governments the opportunity to respond in a timely manner to the allegations made. We will therefore require that those filing such petitions must serve



them on the state or local governments that are the subject of the petition as well as on those otherwise identified in the petition whose actions petitioners argue warrant preemption. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under 47 C.F.R. § 1.1212(d) and the parties are so informed.

30. Exempt Presentations. The Commission's programs relating to interstate telecommunications relay services (TRS), universal service support mechanisms (Universal Service), the administration of the North American Numbering Plan (NANP), and the administration of local number portability (number portability) utilize the services of administrators. The functioning of these programs requires frequent and close communications between Commission staff and the various administrators, and the staff generally has not treated these communications as presentations. We will amend the ex parte rules to provide expressly that presentations between Commission staff and the administrators are exempt, provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding.

31. Status inquiries. We also wish to make a slight modification to our treatment of status inquiries. Status inquiries are not considered "presentations" and are thus not subject to ex parte limitations so long as:

... no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay, no view is expressed as to the merits or outcome of the proceeding, and no view is expressed as to a date by which the proceeding should be resolved.

47 C.F.R. § 1.1202(a) Note. Under our former rules, this definition implied that a presentation by a party in a restricted proceeding requesting action by a particular date or giving reasons that a proceeding should be expedited, other than the need to avoid administrative delay, were prohibited. In revising the rules, we changed our policy and classified oral presentations of this nature in restricted proceedings as exempt. They are now permissible subject to certain disclosure requirements. 47 C.F.R. § 1.1204(a)(11).

32. Upon reflection, we find that this more liberal treatment is appropriate only in non-hearing proceedings. In hearing proceedings, a higher standard of formality is called for. See 47 C.F.R. § 1.1204(a)(10)(i) (exemption for presentations requested by or made with the advance approval of the Commission applies to restricted proceedings only if the proceeding has not been designated for hearing). We will modify the rules accordingly.

33. Additionally, the rule currently requires that following a status inquiry covered by

this provision, "a summary" of the presentation be filed and served. In other analogous rules requiring disclosure, we have endeavored to clarify the nature of the summary called for. We will therefore specify that a "detailed" summary must be filed.

34. Clarifications and typographical errors. As a final matter, since the amended rules became effective, we have become aware of several instances in which the intent of a provision was unclear or in which the published version of the rule contained a typographical error. We will now address these nonsubstantive corrections to the rules.

35. We turn first to the typographical errors. The text of 47 C.F.R. §§ 1.1203(a) and 1.1204(a), as published, each contains a typographical error. The former provision mistakenly omits the word "unless" immediately before the colon preceding subsection (1). The latter provision contains the superfluous phrase: "and circulation period," which should be deleted. The text of 47 C.F.R. § 1.1208 inadvertently omits the phrase "to or from Commission decision-making personnel" immediately before the phrase "are prohibited in all proceedings," consistent with the rule prior to amendment. Additionally, the text of 47 C.F.R. § 1.1206(a)(10)(iii) inadvertently omits the phrase "of any new written information elicited from such request or a summary of any new oral information elicited from such request" immediately after the word "disclosure" and before the phrase "must be made," consistent with subsection (a)(ii).

36. We next turn to the clarifications. The provisions of 47 C.F.R. § 1.1204(a)(5) classify as exempt presentations by an agency or branch of the Federal Government with which the Commission shares jurisdiction. Similarly, 47 C.F.R. § 1.1204(a)(6) treats as exempt certain presentations by United States Department of Justice and the Federal Trade Commission. The latter provision specifies that it does not apply when the relevant agency is a party to the proceeding. That last caveat is overly broad as applied to informal rulemakings, since under 47 C.F.R. § 1.1202(d)(6), the general public is defined as a party in such proceedings. Our intent was not to exclude all informal rulemakings from the operation of the exemption but only those in which the relevant agency filed comments. We will amend the rule accordingly.

37. We also believe that 47 C.F.R. § 1.1210 should be clarified. That section now reads:

No person shall solicit or encourage others to make any presentation which he or she is prohibited from making under the provisions of this subpart.

Application of this language would have an effect that we did not intend in certain situations. For example, under 47 C.F.R. § 1.1206(b)(3), members of Congress may make without disclosure certain presentations in permit-but-disclose proceedings that other persons would

have to disclose. Thus, if a person solicited such an undisclosed presentation by a member of Congress, it would violate the present language of the rule, although the rules do not require that such presentations be disclosed. We will amend the rule to clarify that our intent is to prohibit only the solicitation of impermissible presentations.

38. By way of further clarification, we will amend 47 C.F.R. § 1.1204(a)(9), which currently treats ex parte presentations as exempt where "confidentiality is necessary to protect persons making ex parte presentations from possible reprisal." We are concerned that this language does not provide sufficient guidance as to whether persons relying on this provision must seek assurance of confidentiality in advance. We also believe that it is desirable for this provision to track more closely the analogous provisions of the Freedom of Information Act, 47 U.S.C. § 552(b)(7). Accordingly, we will specify that the exemption will apply only where information has been provided based on an express or implied promise that it would remain confidential. See 47 U.S.C. § 552(b)(7)(D). Such a promise will be unnecessary only in the case where there is a reasonable expectation that disclosure would endanger the life or physical safety of the informant. See 47 U.S.C. § 552(b)(7)(F).

39. A final clarification does not require amendment of the rules but may be helpful in avoiding confusion. Under 47 C.F.R. § 1.1203(b)(3), we created an exception to the Sunshine period prohibition when:

The presentation occurs during the course of a widely-attended speech or panel discussion and concerns a Commission action in an exempt or a permit-but-disclose proceeding that has been adopted . . .

We wish to make clear that while such presentations are exempt from the Sunshine period prohibition, they are nevertheless still subject to permit-but-disclose requirements and must be disclosed as appropriate.

40. Public Notices. One final matter does not involve a modification of the rules. We are confident that the revised ex parte rules have given the public a simple and clear means to determine the ex parte status of particular proceedings. Nevertheless, we believe that it would be helpful for Bureau and Offices to specify the ex parte status of proceedings when they issue public notices, for example, calling for comments. This is already frequently done, and we believe that it provides valuable guidance to the public. We encourage the Bureaus and Offices to follow this practice.

## VI. ORDERING CLAUSES

41. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration of

Hogan & Hartson, L.L.P., filed May 2, 1997, and the Petition for Reconsideration, filed May 5, 1997, by Lukas, McGowan, Nace & Gutierrez ARE DENIED.

42. IT IS FURTHER ORDERED, That the Report and Order, Amendment of 47 C.F.R. § 1.1200, FCC 97-92 (Mar. 19, 1997), 12 FCC Rcd 7348 (1997), IS MODIFIED as provided above and in the Appendix to this memorandum opinion and order.

43. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

## APPENDIX

## Rule Changes

Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 1 -- PRACTICE AND PROCEDURE**

1. The authority citation for Part I continues to read as follows:

**AUTHORITY: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.**

2. Section 1.1202 is revised to read as follows:

**§ 1.1202 Definitions.**

(a) \*\*\*

Note to paragraph (a): A communication expressing concern about administrative delay or expressing concern that a proceeding be resolved expeditiously will be treated as a permissible status inquiry so long as no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay, no view is expressed as to the merits or outcome of the proceeding, and no view is expressed as to a date by which the proceeding should be resolved. A presentation by a party in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay (and responsive presentations by other parties) may be made on an ex parte basis subject to the provisions of § 1.1204(a)(11).

\*\*\*\*\*

(d) Party. Unless otherwise ordered by the Commission, the following persons are parties:

(1) In a proceeding not designated for hearing, any person who files an application, waiver request, petition, motion, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person (other than an individual viewer or listener filing comments regarding a pending broadcast application or members of Congress or their staffs or branches of the federal government or their staffs) filing a written submission referencing and regarding such pending filing which is served on the filer, or, in the case of an application, any person filing a mutually exclusive application;

(2) Any person who files a complaint or request to revoke a license or other

authorization or for an order to show cause which shows that the complainant has served it on the subject of the complaint or which is a formal complaint under 47 U.S.C. § 208 and § 1.721 or 47 U.S.C. § 255 and § 5.21, and the person who is the subject of such a complaint or request that shows service or is a formal complaint under 47 U.S.C. § 208 and § 1.721 or 47 U.S.C. § 255 and § 5.21;

(3) The subject of an order to show cause, hearing designation order, notice of apparent liability, or similar notice or order, or petition for such notice or order;

(4) In a proceeding designated for hearing, any person who has been given formal party status; and

(5) In an informal rulemaking proceeding conducted under section 553 of the Administrative Procedure Act (other than a proceeding for the allotment of a broadcast channel) or a proceeding before a Joint Board or before the Commission to consider the recommendation of a Joint Board, members of the general public after the issuance of a notice of proposed rulemaking or other order as provided under § 1.1206(a)(1) or (2).

\*\*\*\*\*

Note 5 to paragraph (d): A member of Congress or his or her staff, or other agencies or branches of the federal government or their staffs will not become a party by service of a written submission regarding a pending proceeding that has not been designated for hearing unless the submission affirmatively seeks and warrants grant of party status.

3. Section 1.1203 is revised to read as follows:

**§ 1.1203 Sunshine period prohibition.**

(a) With respect to any Commission proceeding, all presentations to decision-makers concerning matters listed on a Sunshine Agenda, whether ex parte or not, are prohibited during the period prescribed in paragraph (b) of this section unless:

\*\*\*\*\*

4. Section 1.1204 is revised to read as follows:

**§ 1.1204 Exempt ex parte presentations and proceedings.**

(a) Exempt ex parte presentations. The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda period

prohibition (§ 1.1203):

\*\*\*\*\*

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or Joint board proceeding) provided that; any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

\*\*\*\*\*

(9) The presentation is made pursuant to an express or implied promise of confidentiality to protect an individual from the possibility of reprisal, or there is a reasonable expectation that disclosure would endanger the life or physical safety of an individual;

(10)\*\*\*

(iii) If the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure of any new written information elicited from such request or a summary of any new oral information elicited from such request must be made in accordance with the requirements of § 1.1206(b), provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement. As in paragraph (a)(10)(ii) of this section, information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits, shall not be deemed to be new information for purposes of this section;

(11) The presentation is an oral presentation in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay. A detailed summary of the presentation shall promptly be filed in the record and served by the person making the presentation on the other parties to the proceeding, who may respond in support or opposition to the request for expedition, including by oral ex parte presentation, subject to the same service requirement.

(12) The presentation is between Commission staff and:

(i) the administrator of the interstate telecommunications relay services fund relating to administration of the telecommunications relay services fund pursuant to 47 U.S.C.

§ 225;

(ii) the North American Numbering Plan Administrator or the North American Numbering Plan Billing and Collection Agent relating to the administration of the North American Numbering Plan pursuant to 47 U.S.C. § 251(e);

(iii) the Universal Service Administrative Company relating to the administration of universal service support mechanisms pursuant to 47 U.S.C. § 254; or

(iv) the Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. § 251(b)(2) and (e);

provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding.

(b)\*\*\*

(2)\*\*\*

Note to paragraph (b): In the case of petitions for rulemaking that seek Commission preemption of state or local regulatory authority, the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.

\*\*\*\*\*

5. Section 1.1206 is revised to read as follows:

**§ 1.1206 Permit-but-disclose proceedings.**

(a) \*\*\*

Note 1 to paragraph (a): In the case of petitions for declaratory ruling that seek Commission preemption of state or local regulatory authority, the petitioner must serve the original petition on any state or local government, the actions of which are specifically cited as a basis for requesting preemption. Service should be made on those bodies within the state or local governments that are legally authorized to accept service of legal documents in a civil



context. Such pleadings that are not served will be dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) and the parties are so informed.

\*\*\*\*\*

(7)\*\*\*

Note 2 to paragraph (a): Where the requested information is the subject of a request for confidentiality, the person filing the request for confidentiality shall be deemed a party.

\*\*\*\*\*

(12) A modification request filed pursuant to § 64.1001 of this chapter;

(13) Applications by Bell Operating Companies to provide in-region, interLATA services pursuant to § 271(d) of the Communications Act; and

(14) Petitions for Commission preemption of authority to review interconnection agreements under § 252(e)(5) of the Communications Act and petitions for preemption under § 253 of the Communications Act..

Note 3 to paragraph (a): In a permit-but-disclose proceeding involving only one "party," as defined in § 1.1202(d) of this subpart, the party and the Commission may freely make presentations to each other and need not comply with the disclosure requirements of paragraph (b) of this section.

6. Section 1.1208 is revised to read as follows:

**§ 1.1208 Restricted proceedings.**

Unless otherwise provided by the Commission or its staff pursuant to § 1.1200(a), ex parte presentations (other than ex parte presentations exempt under § 1.1204 (a)) to or from Commission decision-making personnel are prohibited in all proceedings not listed as exempt in § 1.1204(b) or permit-but-disclose in § 1.1206(a) until the proceeding is no longer subject to administrative reconsideration or review or judicial review. Proceedings in which ex parte presentations are prohibited, referred to as "restricted" proceedings, include, but are not limited to, all proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings).

7. Section 1.1210 is revised to read as follows:

**§ 1.1210 Prohibition on solicitation of presentations.**

No person shall solicit or encourage others to make any improper presentation under the provisions of this subpart.